Cooper

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Defense Technology Corp.; Department of the Navy--Requests for Reconsideration
File: B-229972.2; B-229972.3

Date: September 21, 1988

DIGEST

1. Decision that agency's proposed modifications to a contract were beyond the scope of the contract is affirmed where the contracting agency's and the protester's requests for reconsideration fail to show that the decision was legally or factually incorrect.

2. Recommendation that an agency terminate an existing contract and resolicit the requirement because the agency proposed to issue modifications that exceed the contract's scope is modified. The agency has not implemented the proposed modifications, and the record shows it would be in the government's best interest to accept the agency's proposal that it first explore other possible modifications to the contract which do not go beyond the scope of that contract, and, if that effort is unsuccessful, that it review the results of any resolicitation before terminating. In any case, the protester is entitled to recover the costs of filing and pursuing its protest.

DECISION

Defense Technology Corp. and the Department of the Navy request reconsideration of our decision in Avtron Manufacturing, Inc., B-229972, May 16, 1988, 67 Comp. Gen. ____, 88-1 CPD ¶ 458. In that decision, we sustained the protest by Avtron that the Navy's proposed modifications to contract No. N00140-87-C-9064 with Defense Technology Corporation for the design, construction, installation and testing of aircraft generator system test stands were beyond the scope of the contract for which the competition was conducted. We recommended that the contract with Defense Technology be terminated and the requirement resolicited under the modified specifications.

We affirm our finding that the Navy's proposed modifications to the contract with Defense Technology were beyond the

scope of the contract, but, for the reasons indicated below, we modify our recommendation that the contract be terminated and the requirement resolicited. We also conclude that Avtron is entitled to recover the costs of filing and pursuing its protest.

The RFP under which the contract was awarded contemplated the award of a fixed-price, multiyear contract for first article units, data, and production and option quantities of hardware to be used to test Navy aircraft generators at land bases and on shipboard. The purchase description for the test stands imposed no requirements for input power to the test stands or for the amount of heat allowed to emanate from the units, and the Navy specifically excluded the use of two shafts in the variable speed drive assembly that provides the power to drive and cool the generator. Defense Technology, the low offeror, proposed to use a hydroviscous drive in the variable speed drive assembly, rather than the more conventional electric drive proposed by Avtron. The Navy awarded a contract to Defense Technology on December 24, 1986. First article under the contract were scheduled to be delivered in August of 1988.

During a routine design review of the contract in February 1987, the Navy learned that the input power required to run the test stands and the heat created by the units would exceed the capabilities of the existing facilities to house them, and that the horsepower output of the units could be reduced. As a result, the Navy changed the purchase description and modified the contract with Defense Technology on April 10, 1987, to revise the horsepower requirement. However, this modification was not adequate to resolve the heat ejection problem, so the Navy proposed to modify the purchase description further and issue a change order to the contract with Defense Technology to specify a limitation on the input power required to run the test stands and allow for two output shafts running to the aircraft generator in order to reduce the heat ejection level. Avtron protested to our Office that the Navy's proposed modification to the purchase description materially altered the terms of the original contract.

We found that the Navy's proposed modifications would materially alter the terms of the original contract and change the field of competition. We therefore recommended that the Navy terminate the contract with Defense Technology and resolicit under the modified specification.

In its request for reconsideration, the Navy initially argues that Avtron's January 11, 1988, protest was untimely because Avtron was protesting the increase in the number of

output shafts permitted by the proposed modification to the specification, and, the Navy asserts, Avtron knew that the Navy had decided that it was not necessary to have a single output pad (which necessarily involves a single output drive shaft) as early as August 4, 1987. This knowledge is evidenced, according to the Navy, by an August 4, 1987, letter from Avtron to the Navy on the agency's purchasing of test stands. Avtron asserts that its letter dealt with issues surrounding the Navy's plan to create a second procurement for shipboard test stands and that Avtron was not informed of the Navy's proposed modifications to the purchase description and Defense Technology's contract until January 6, 1988, 5 days before Avtron protested to our Office.

Avtron's protest was timely. A protest of other than apparent solicitation improprieties must be filed within 10 working days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1988). Although Avtron's August 4, 1987, letter to the Navy states that Avtron understands that the Navy no longer thinks it necessary to have a single output pad or continuous speed range for shipboard application of test stands, the letter refers to Avtron's understanding concerning a possible new procurement by the Navy of newly designed test stands for shipboard use. There is no evidence in the record to refute Avtron's assertion that it did not have knowledge until January 6, 1988, that the Navy was planning to modify the input power requirement and allow two output shafts for the test stands under Defense Technology's existing contract. Accordingly, Avtron filed a timely protest in our Office on January 11.

Secondly, both the Navy and Defense Technology argue that we erred in concluding that the Navy's proposed modification represents a cardinal change in Defense Technology's contract so as to be outside the scope of the contract's Change clause. A party requesting that we reconsider a bid protest decision must show that our prior decision contains either errors of fact or of law or information not previously considered that warrant its reversal or modification. 4 C.F.R. § 21.12. Repetition of arguments made during resolution of the original protest, or mere disagreement with our decision, does not meet this standard. Hi-Q Environmental Products Co.--Reconsideration, B-229683.2, May 19, 1988, 88-1 CPD ¶ 474.

Neither Defense Technology nor the Navy, in their requests for reconsideration, has introduced any new facts or legal arguments concerning the issue of whether or not the Navy's proposed modifications, the addition of an input power

requirement and an increase in the number of output shafts, materially modify the performance specifications of the test stand. Rather, the Navy argues that our decision incorrectly focuses on whether the outcome of the competition for the test stands would have been different under the revised specifications, instead of on whether the original contract and the modified contract are essentially the same and whether all interested parties had been included in the original competition.

We do not agree with the Navy's analysis of our decision. The test for whether a change is outside the original contract's scope is whether the original nature or purpose of the contract would be so substantially changed by the modification that the original and modified contracts would be essentially different and the field of competition materially changed. See American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD ¶ 136. We found that the original contract and the modified contract would be materially different as a result of the proposed modifications and that proposals submitted on the basis of the modified performance specifications would be different in design, price and delivery schedule from those submitted under the original purchase description. This clearly did not constitute an inappropriate focus on only who originally might have competed against the relaxed specifications or on what the outcome of such a competition might have been, but instead a recognition that the modifications involved a cardinal change in the specifications (a "basic change" by the Navy's own admission), and that the field of competition under a revised RFP would reflect that material difference and be changed accordingly. These matters are precisely the appropriate considerations in cases like this. Id.

Defense Technology further asserts that the use of two output shafts is not inseparably linked to the input power limitation, and that the contract's current statement of work is adequate to cover the proposed modifications. With respect to these factual assertions, the Navy itself argues that two output shafts are necessary in order to implement the input limitation, and proposes to alter the performance specification accordingly. Defense Technology presents no evidence in this record to support its position that the Navy's need for reduced heat ejection can be met without increasing the number of output drive shafts, or that the statement of work of its current contract is adequate to meet the Navy's current needs.

With respect to our recommendation that the contract with Defense Technology be terminated for convenience and the requirement resolicited under the modified specifications,

both the Navy and Defense Technology argue that we failed to consider the fact that the modifications were proposed, rather than issued. The Navy also now informs us that termination of Defense Technology's contract would probably result in a termination settlement in excess of $500,000 and a 2-year delay in the acquisition process. Such a delay, according to the Navy, would aggravate a serious shortage of aircraft generator test stands due to the fact that none of the test stands currently in use by the Navy has the capacity to fully test all Navy aircraft and the existing shipboard test stands have already passed their projected life expectancy. The agency proposes that, in lieu of terminating Defense Technology's contract, the agency's engineers explore other possible modifications to the performance specifications that would solve the input power and heat ejection problems, and would be appropriate under the Changes clause of the contract with Defense Technology. The Navy further suggests that, in the event the proposed modifications to the performance specifications at issue here are necessary, the contract with Defense Technology be suspended while the Navy initiates a new acquisition under the revised performance specifications. If the cost of award to the low offeror under such a new acquisition plus the cost of the termination settlement with Defense Technology exceeds the cost of the existing contract, including the proposed modifications, then the Navy proposes to modify the contract with Defense Technology and proceed with performance.

We first point out that the issue as presented by the Navy was ripe for decision in this forum since the modifications were presented by the Navy itself as necessary and inevitable in order to meet the Navy's actual needs. Nonetheless, in light of the fact that the Navy has not yet implemented the proposed modifications, and because of the Navy's urgent need for the test stands and the potential negative impact on the Navy's mission, we see no reason to object to the Navy's pursuing the alternatives it has proposed to terminating the existing contract with Defense Technology and resoliciting. We therefore modify the recommendation in our prior decision accordingly. In these circumstances, however, we find Avtron entitled to recover the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d)(1).

Our prior decision is affirmed, as modified.

for James F. Hinchman
Comptroller General
of the United States